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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

RIESBECK FOOD MARKETS, INC.,
and ELM GROVE PROPERTIES,
Petitioners,

v.

UNITED FOOD AND COMMERCIAL
WORKERS, LOCAL UNION 23, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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BRIEF FOR THE NATIONAL GROCERS ASSOCIATION AND THE INTERNATIONAL MASS RETAIL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF FOR THE NATIONAL GROCERS ASSOCIATION AND THE INTERNATIONAL MASS RETAIL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

This brief *amici curiae* of the National Grocers Association ("N.G.A.") and the International Mass Retail Association

("IMRA"), with the consent of the parties, is filed in support of the petitioners.[1]

STATEMENT OF INTEREST

The N.G.A. is a nonprofit national trade association of over 2,500 retail and wholesale grocery firms operating or supplying over 50,000 independent retail grocery stores. N.G.A. members account for the sale and distribution of almost half of U.S. food and grocery products.

IMRA is a nonprofit trade association of mass retailers. IMRA's more than 100 retail members operate over 40,000 stores throughout the U.S. and generate over $150 billion in annual sales. IMRA members range in size from one-store businesses to multi-billion dollar chains operating thousands of stores throughout the nation.

N.G.A. and IMRA members operate retail stores in various physical settings, including freestanding stores, stores within shopping malls, and stores within strip shopping centers. These settings include urban, suburban and rural locations across the country. Customers generally are permitted access as business invitees to the stores and to the private property areas surrounding the stores, including parking lot areas. The success of these enterprises hinges upon the undisturbed ability of general public patrons to approach and enter the stores.

Member stores increasingly are expressing to *amici* their grave concerns about uninvited non-employee labor union agents intruding upon private property for the purpose of communicating to store customers with pickets and handbills.

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[1] On July 31, 1991 an extension of time to August 23, 1991 was granted to counsel for respondents for the filing of a brief in opposition to the petition. This brief is timely if filed on or before August 23, 1991. Letters of consent are filed with the Clerk pursuant to Rule 37.

Their concerns are that there is an inherent risk of violence in such activity, that there is a significant disruption of legitimate business activity, and that federal and state laws usually are inadequate to protect their property interests.

In the overwhelming majority of such instances, as in the instant case, the union's objective is solely informational. The typical informational message on the pickets and handbills urges customers not to patronize the store because the store does not have a labor contract with the union (or, in the case of the less frequent "area standards" picketing and handbilling, that the store does not pay wages and benefits equal to the level found in union contracts in the same geographic area). The union's informational or "area standards" message is directed exclusively to the store's customers. The picketing and handbilling typically is carried out on private property at the store entrances and parking lot areas by union agents confronting the customers with their pickets and handbills. The union in these cases generally makes no request for recognition as the bargaining agent for the store's employees, and actually has disavowed any organizational or recognitional objective whatsoever. Indeed, store employees, who are neither participants in nor targets of the union activity, would stand to lose their jobs if the union activity was successful.

Even in the absence of actual violence, the potential for serious violence causing harm to customers, employees and union agents, and for disruption of business operations, is ever present. Faced with these prospects, and with no federal forum available in which to contest the union's activity because trespassory union picketing and handbilling is not, in itself, proscribed as a specifically enumerated unfair labor practice, the employer will seek vindication of its property rights in the only forum available -- a trespass action filed in state court. The union, as in this case, will then respond by filing an unfair labor practice charge with the National Labor Relations Board (the "NLRB" or "Board"), claiming that its federal rights have been violated, in an attempt to provide a basis for arguing

before the state court that the court's jurisdiction over the trespass action was preempted by federal law at the moment the union filed the charge.

Thus, the question presented in this case of whether the Supreme Court of Appeals of West Virginia properly ruled that the petitioners' state court trespass action against the union was preempted by the National Labor Relations Act (the "Act" or "NLRA"), 29 U.S.C. § 151 *et seq.*, upon the union's mere claim that its federal rights were violated is of vital interest to the N.G.A. and IMRA, whose members often face the need to vindicate their private property rights against non-employee trespassory union picketing and handbilling. The members of N.G.A. and IMRA are adversely affected by the West Virginia court's decision, and N.G.A. and IMRA believe that their perspective on the issue presented will assist this Court in assessing the need to review that court's decision.

SUMMARY OF ARGUMENT

The decision of the West Virginia Supreme Court of Appeals in this case raises an issue of great importance to labor-management relations and to the overlapping roles of the federal and state governments with respect to promoting industrial peace and protecting private property. N.G.A. and IMRA in this brief show that the writ of certiorari should be granted because the decision below, if left undisturbed, would leave employers facing trespassory union picketing and handbilling in a "no-man's land." Employers would have no readily available forum, state or federal, in which to vindicate their property rights, and would be forced to wait for several years before the NLRB determines whether the union was entitled to carry out any of its activities on private property.

N.G.A. and IMRA also urge that the writ be granted because the critical issue in this case is intertwined with the issue raised in *Lechmere, Inc. v. NLRB*, 914 F.2d 313 (1st Cir. 1990), cert. granted, No. 90-970, 111 S.Ct. 1305 (1991), which

is set for argument at the 1991 Term.[2] This case, and *Lechmere*, represent both sides of the dual federal-state question of the extent to which union agents are permitted to carry out trespassory picketing and handbilling activity that is arguably protected, or prohibited, by the NLRA.

Lechmere, however, as a representative of cases decided by the NLRB under the Board's balancing test in *Jean Country*, 291 NLRB No. 4 (1988), fails to represent one very significant collateral federal issue that can arise in any of the numerous *Jean Country* type cases before the NLRB. That issue is whether an employer's filing and maintenance of a trespass action against a union in state court constitutes an independent violation of Section 8(a)(1) of the Act. Because the answer to that question turns upon whether the lawsuit brought in state court has a reasonable basis within the meaning of *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), this Court's resolution of the *Sears* preemption question raised in the instant case is critical to determining the outcome of the case before NLRB as well as the case before the state court.

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[2] IMRA, together with the Chamber of Commerce of the United States of America, as *amici curiae*, has expressed its views on *Lechmere* in a brief previously filed with the Court.

ARGUMENT

I. THE WEST VIRGINIA SUPREME COURT OF APPEALS DECISION LEAVES EMPLOYERS WITH NO FORUM FOR TIMELY VINDICATION OF THEIR PROPERTY RIGHTS AND MISCONSTRUES THIS COURT'S PREEMPTION RULING IN *SEARS*.

The basic issue in this case is whether invoking NLRB jurisdiction by the mere filing of an unfair labor practice charge by a labor union engaged in non-employee, trespassory, informational picketing and handbilling automatically establishes federal preemption of a trespass action initiated and maintained in state court by the adversely affected employer. In *Sears, Roebuck & Co., v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180 (1978), the Court found no federal preemption of a state court trespass action against area standards picketing by a union on an employer's private property, even though the union's activity was arguably protected by the NLRA.

In *Sears*, unlike the instant case, the union had not sought to invoke the Board's jurisdiction by filing an unfair labor practice charge against the employer. Nonetheless, the basis of the Court's decision appears fully applicable here -- that the controversy presented to the state forum by the employer was not the same as the issue that could have been presented by the union to the NLRB. Thus, the test for federal preemption established in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), had not been met. This explanation of the basis for the Court's holding in Sears was summarized more recently by the Court in *Belknap, Inc. v. Hale*, 463 U.S. 491, (1983), as follows:

> ... we held [in *Sears*] that a state trespass action was permissible and not preempted, since the action concerned only the *location* of the picketing while the

> arguable unfair labor practice would focus on the *object* of the picketing. In that case we emphasized that a critical inquiry in applying the *Garmon* rules, where the conduct at issue in the state litigation is said to be arguably prohibited by the Act and hence within the exclusive jurisdiction of the NLRB, is whether the controversy presented to the state court is identical with that which could be presented to the Board. There the state court and Board controversies could not fairly be called identical. *Id.* at 510. (emphasis added).

The West Virginia Supreme Court of Appeals, in a split decision, erroneously construed the *Sears* decision as calling for a finding that the petitioners' state court trespass action was preempted by the NLRA merely upon the lodging of a charge by the union with the General Counsel of the NLRB.[3] As in *Sears*, the issues before the state court and the NLRB were not identical. The state court's jurisdiction over the trespass action challenging only the location of the union activity, therefore, should not be deemed to be preempted at that point, or at any point before the NLRB issues a final decision on the merits of the case.

Principles of federalism mean that there must be a reasonable accommodation of the role of state courts in protecting private property rights in the first instance. Affirming the jurisdiction of state courts over trespass claims, even where the union activity ultimately might be found to enjoy federal protection, poses only a minor risk of improper interference with legitimate union activity because such activity, when conducted on private property, is only rarely to be accorded protection

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[3] The great majority of unfair labor practice charges are either withdrawn or administratively dismissed. In fiscal years 1988 and 1989, only 37 percent of unfair labor practice charges were found to have merit and warrant issuance of a complaint by the General Counsel. *54th Annual Report of the National Labor Relations Board*, U.S. Government Printing Office, 1991, p. 6.

under the Act.[4] The Board should and will decide whether the union's non-employee informational picketing and handbilling activity is protected by Section 7 of the Act; the state court, however, should not be deprived of jurisdiction in the meantime to decide whether the *location* is permissible under the particular circumstances of the case before it.[5]

The West Virginia court's decision leaves the employer with no readily available forum either to vindicate its property rights or to determine whether the union's trespassory activity was protected by the NLRA. The Act's proscriptions against certain conduct by labor organizations do not include the type of action at issue in this case. Accordingly, there is no action against trespassory union picketing or handbilling in itself that an employer can bring against the union before the NLRB, leaving the employer to resort to self-help measures and to face the prospect of a potentially violent dispute on the employer's property. Only by attempting to remove the union agents, and only if the union then responds by filing unfair labor practice charges with the NLRB, may the issue of the union's rights under the Act possibly be decided by the NLRB.

Whether unfair labor practice charges are filed is exclusively in the hands of the union. Moreover, even if proceedings against the employer are instituted by the agency's General Counsel upon a charge filed by the union, it may well be two or more years before a final NLRB decision on the

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[4] *Sears*, 436 U.S. at 205.

[5] In cases where there are unusual and compelling circumstances which cause the NLRB to believe that the exercise of state court jurisdiction over union activity is improper, the Board, prior to issuance of its final decision on the merits of the case before it, can authorize the General Counsel to seek an injunction in a federal district court against the state action under Section 10(j) of the Act. *NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1971).

merits is issued.[6] In the meantime, the employer will have been unable to take any legal action anywhere to vindicate its property rights. This is precisely the "no-man's land" foreseen by Justice Powell in his separate concurring opinion in *Sears*.

Justice Powell's concurrence in *Sears* emphasized the danger of violence inherent in precluding state adjudication of an employer's complaint against trespassory union picketing. *Sears*, 436 U.S. at 212-13. The circumstances of the instant case clearly demonstrate the reality of the dilemma foreseen by Justice Powell. Following the filing of unfair labor practice charges by the union in this case, the General Counsel spent *more than one year* investigating the case before deciding to issue a complaint against the employer. The unfair labor practice case is still pending before the Board, nearly *three years* since the charge was filed on September 19, 1988.

N.G.A. and IMRA submit that the circumstances of this case vividly illustrate the "no-man's land" problem described by Justice Powell and the urgent need for a resolution by this Court of the critical preemption issue that this case presents.

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[6] NLRB data show that the median average of elapsed time from the filing of an unfair practice charge until the issuance of a final decision by the Board, is more than two years. *54th Annual Report of the National Labor Relations Board*, note 3, *supra*, p. 249.

II. A WRIT OF CERTIORARI SHOULD ISSUE IN THIS CASE IN ORDER TO RECONCILE STATE COURT JURISDICTION OVER TRESPASS ACTIONS AND NLRB ENFORCEMENT OF EMPLOYEE SECTION 7 RIGHTS

A. The NLRB's *Jean Country* Cases Involve Charges Against Employers for Maintaining State Court Lawsuits Challenging the Location of Union Activity.

Amici also wish to draw the Court's attention to another important aspect of the interplay between the critical *Sears* question raised in the instant case and the problems facing employers in corresponding *Jean Country* cases, of which the pending *Lechmere* case is a limited example. Although not at issue in *Lechmere*, virtually any *Jean Country* trespassory union activity case before the NLRB potentially involves the circumstance in which the employer will have attempted to vindicate its property rights through a trespass action in state court, and the question of whether that action in itself will be found to be a violation of the NLRA. That is exactly the circumstance of the instant case.

The petitioner Riesbeck Food Markets, Inc., as respondent in the corresponding unfair labor practice case before the NLRB,[7] is charged with having committed a violation of Section 8(a)(1) of the Act by filing a trespass action against the union in state court seeking the removal of union agents from private property, and by maintaining the lawsuit after the unfair labor practice charge was filed by the union. In the General Counsel's view, the lawsuit was preempted at that point.

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[7] *Riesbeck Food Markets, Inc.*, Case Nos. 8-CA-21274, 8-CA-22332, ALJ slip op. January 28, 1991, transferred to and continued before the Board, pending as of the date of this brief.

Whether the NLRB rules in favor of the General Counsel and the union on such charges largely depends upon the Board's determination of whether the employer's filing and maintenance of the state trespass action against the union was preempted merely by the union's filing of an unfair labor practice charge against the employer. The Board has recently considered that question in *Giant Food Stores, Inc.*, 295 NLRB No. 38 (1989), *motion for reconsideration denied*, 298 NLRB No. 50 (1990). The Board in *Giant* explained that it would apply the Court's analytical framework in *Bill Johnson's Restaurants*, as follows:

> In *Bill Johnson's Restaurants*, above, the Supreme Court, while acknowledging that lawsuits filed by employers may be powerful instruments of coercion or retaliation, nonetheless found that the first amendment right of access to the courts and the States' compelling interest in maintaining domestic peace prohibited the Board from enjoining as an unfair labor practice a well-grounded lawsuit regardless of the employer's motivation in filing it. The Court indicated, however, that the Board was empowered to enjoin a lawsuit that lacks a reasonable basis if the lawsuit was filed with the intent to retaliate against employees exercising their rights under the Act.
>
> The Court further indicated that when confronted with an allegation that the filing and prosecution of a lawsuit violates the Act, the Board first must determine whether the suit has a "reasonable basis." (footnote omitted). If it is found that the suit lacks a reasonable basis, the Board may then proceed with the unfair labor practice proceeding and determine whether the suit was filed with a retaliatory motive. Should the Board determine that the suit has a reasonable basis, however, then the Board may not enjoin the suit, but must stay its unfair labor practice proceeding until the state court suit has been concluded. The Court further stated that

> if the state court ultimately finds merit in the employer's suit, the employer should also prevail before the Board because the filing of a meritorious lawsuit, even if filed for a retaliatory purpose, is not an unfair labor practice. Finally, the Court indicated that if the state court judgment goes against the employer or the suit is 'withdrawn or is otherwise shown to be without merit, the employer has had its day in court, the interest of the State in providing a forum for its citizens has been vindicated, and the Board may then proceed to adjudicate the ... unfair labor practice case.' *Bill Johnson's Restaurants*, 461 U.S. at 747.

295 NLRB No. 38, at 10-11.

In *Giant*, the employer had filed a trespass action against a union, in response to which the union filed an unfair labor practice charge. The NLRB General Counsel issued a complaint on the grounds that the employer's lawsuit had no reasonable basis because it was preempted and, therefore, under *Bill Johnson's* constituted a violation of the NLRA. The state court trespass lawsuit was pending on appeal at the time of the NLRB decision, in which the Board rejected the General Counsel's contention. Citing *Longshoremen v. Davis*, 476 U.S. 380 (1986), concerning the Court's instruction that a preemption claim against state court jurisdiction must be decided by the state court, the Board stated:

> Because the state court was obligated to consider the preemption claim once it was raised by the union, it cannot be said that the litigation of that issue or the subsequent appeal of the state court's resolution of the issue, without more, lacked a reasonable basis.

295 NLRB No. 38, at 12 (footnote omitted).

Despite the Board's decision in *Giant*, in the NLRB case against petitioner Riesbeck Food Markets pending before the

Board, the General Counsel contends that the mere filing of the union's charge was sufficient to establish federal preemption of Riesbeck's state court lawsuit and that, under the *Bill Johnson's* analysis, the maintenance of the lawsuit is a violation of the Act. Notwithstanding the decision of the West Virginia Supreme Court of Appeals (which issued subsequent to the Administrative Law Judge's recommended decision in the NLRB case[8]), Riesbeck contends before the Board that its state court lawsuit had a reasonable basis and that, in any event, it had no retaliatory motive.

Granting the writ in this case and clarifying the circumstances under which the *Sears* preemption principles apply would serve the important ancillary purpose of resolving the confusion at the NLRB, where the General Counsel persists in his prosecutorial view, and there appears to be no clear majority view among the Members of the Board. In *Giant*, Chairman Stephens, in a footnote concerning Justice Powell's concurrence in *Sears*, stated in part:

> It cannot be said at this point that the Respondents acted without reasonable basis in attempting to persuade the state court that it should follow the reasoning of Justice Powell's concurring opinion in Sears, which took the view that state court jurisdiction over trespassory area standards picketing was not automatically preempted on the filing of an unfair labor practice charge with the Board challenging the exclusion of the pickets.

295 NLRB No. 38, fn. 13.

No other Board Member expressed a specific view with respect to the applicability and interpretation of the *Sears* test. Moreover, two other Board decisions, one issued before and

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[8] *Supra*, note 7.

one after *Giant*, appear to contradict *Giant* by holding that the employer's cause of action in state court was preempted by federal law and, as such, was unlawful under the NLRA. *American Pacific Concrete Pipe Co., Inc.*, 292 NLRB No. 133 (1989), and *Summitville Tiles, Inc.*, 300 NLRB No. 9 (1990).

Thus, the preemption question presented in the instant case is critical to determining the circumstances in which state courts may exercise jurisdiction over trespassory non-employee union informational picketing and handbilling. It also has an important and direct bearing on whether an employer's state court action against such union activity is deemed to constitute an independent violation of Section 8(a)(1) of the NLRA, a question that may arise in virtually every *Jean Country* type of case before the NLRB.

B. The Board's Application of *Babcock & Wilcox* Principles, Even if Properly Restricted, Will Not Eliminate the Need for Employer Access to State Courts for Injunctive Relief, Nor the Interplay Between the NLRB and State Courts.

The legality of trespassory union activity has been, and no doubt will continue to be, an important and recurring problem under both federal and state law. The enforcement of the respective rights of employers, employees and unions in such circumstances has been the subject of several important decisions of this Court in addition to *Sears*.[9] The Court's consideration of the Board's *Jean Country* test as applied in *Lechmere*, coupled with consideration of the inextricably interwoven preemption question squarely presented in the instant case, would provide a much needed clarification of the

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[9] *NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956); Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972); *Hudgens v. NLRB*, 424 U.S. 507 (1976).

applicable law to the parties, to the NLRB, and to lower courts.

Even in the event that this Court in *Lechmere* restricts the NLRB's interpretation of union access rules under *Babcock & Wilcox*, as urged by the petitioner and *amici* in support of petitioner in that case, future cases, fact bound as they are, necessarily will be determined ultimately on the totality of their particular circumstances. Those circumstances, and their significance, may vary considerably from case to case, especially in light of the Court's conclusion in *Hudgens* that Section 7 rights and property rights occur across a broad spectrum. 424 U.S. at 522. As such, labor organizations and employers in future cases inevitably will differ on the interpretation of their respective rights under both federal and state law.[10] It is illustrative that *Lechmere* involves a question of whether trespassory union activity is protected by Section 7 of the Act in the context of the union's *organizational* objectives, whereas most cases arising under the NLRB's *Jean Country* analysis, as in the instant case, merely involve a union's "*area standards*" or *informational* objectives. It is certain that employer and union claims will continue to conflict and that employers, if they are to have any relief from the "no-man's land" dilemma, are equally certain to require resort to state courts in order to protect their property rights against trespassory activity.

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[10] As this Court has stated in *Sears*, area standards picketing entails only a very limited Section 7 right, in that it has no "vital link to the employees located on the employer's property." 436 U.S. 207 fn. 42. N.G.A. and IMRA, as *amici curiae*, believe that, as in this case, where non-employee trespassory union picketing and handbilling has solely an *informational* objective and is primarily requesting the public not to patronize the targeted employer, the connection to any *employee* rights protected by Section 7 is so much more attenuated as to deserve even less protection under the Act. Although that issue is not present on the facts of *Lechmere*, it is presented by the facts and circumstances of the instant case.

Whatever the outcome in *Lechmere*, which *amici* urge should be considered by the Court in conjunction with the instant case, it is readily apparent that the proper roles of the NLRB and of the state judiciary in our federal system will remain a key issue for all parties involved in trespassory union activity. The NLRB and the state courts in particular require further guidance from this Court.

CONCLUSION

It is essential that the decision of the Supreme Court of Appeals of West Virginia be reviewed and that the application of the Court's preemption principles of *Sears* be clarified. The question presented is a matter of great importance to labor-management relations, to the administration and enforcement of the NLRA, and to the judiciary of every state. It should, therefore, be set for argument consecutively with *Lechmere*, No. 90-970, and be decided by this Court.

Respectfully submitted,

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